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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. [redacted] 31

EDWARD J. GUNNING, PETITIONER,

vs.

GERTRUDE L. COOLEY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF PETITIONER.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 51

EDWARD J. GUNNING, PETITIONER,

vs.

GERTRUDE L. COOLEY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF PETITIONER.

The opinion of the Court below is reported in 58 Appeals D. C., 304; 30 Fed. (2d), 467.

The opinion of Chief Justice Martin, affirming the judgment of the trial court, based upon the holding that because of a conflict in the testimony the trial court was bound to submit the case to the jury for its de-

termination, will be found in the Record, pages 73-79.

The concurring opinion of Mr. Justice Van Orsdel, which he felt "FORCED" to render, NOTWITHSTANDING HIS BELIEF THAT A VERY GRAVE INJUSTICE HAD BEEN DONE IN THE CASE, will be found in the Record, pages 79, 80.

The dissenting opinion of Mr. Justice Robb, holding THAT THERE WAS NO BASIS WHATEVER FOR THE VERDICT AND JUDGMENT, will be found in the Record, pages 80, 81.

For convenience petitioner will be referred to in this brief as ~~plaintiff~~ defendant, and respondent as ~~defendant~~ plaintiff.

Statement of the Case.

Three years, lacking one day, according to her declaration, after plaintiff sustained the injuries complained of, she filed suit in the Supreme Court of the District of Columbia to recover $25,000 damages from the defendant who was then, and for many years prior thereto had been, a practicing physician in the District of Columbia. The basis of her claim as set forth in the declaration, which is in two counts, is, according to the averments of the first count, that the defendant, on October 23, 1922, "negligently and carelessly injected and discharged into the ears and internal organs of the said plaintiff a solution which was harmful, dangerous and destructive of the tissues and drums of the ears, and which was not a solution used by physicians and surgeons in the exercise of such care as is usually used by practicing physicians and surgeons in this locality, to wit, in the District of Columbia, in the treatment of the ears," and, according to the second

count, that the defendant, on October 23, 1922, "negligently injected and discharged into the ears and internal organs of the said plaintiff a solution which was not sweet oil, but was a solution which was harmful and dangerous and destructive of the tissues and drums of the ears" (R., pp. 1-3).

The defendant, in his plea, alleged that the treatment complained of was given by him on October 20, 1922, and consisted in placing a drop or two of pure mineral oil in the external ear of the plaintiff. And for a further plea to the declaration, he alleged that the supposed cause of action on the part of the plaintiff did not accrue at any time within three years next before the commencement of the suit (R., 3-4).

The theory of the plaintiff at the trial was that an "acid" had been injected into her ears.

In support of her claim, plaintiff testified that on October 21, 1922, she first consulted the defendant for a trouble with her throat and received treatment therefor; that on the following Monday evening she again called upon the defendant, who advised her that mouth breathing had caused her sore throat and there was something wrong with her nose and she needed treatment, which he accordingly gave her. The following Wednesday evening she again went to the doctor's office and complained that she thought she had a little cold or wax or something in her right ear; that the defendant looked in her ear and suggested that he drop a little mineral oil in it, which he accordingly did; that after he dropped the mineral oil in her ear she could not explain to anyone the horror of it; that he put a

little silver instrument in her ear and used a dropper that he got from a little bottle on the cabinet (R., p. 17-18). That he inserted the dropper in her right ear and the very minute it went in the pain was horrible, she became dizzy and the room started going around and around. He then dropped some in her left ear, and as he did so she felt the same sensation and struck his arm away; it was terrible; no one knows what she went through. She heard a roaring noise; she does not know whether it was cannon shots or gun shots, but the noises were terrible. Immediately she became ill, lost control of her whole body. It was a couple of months before she could begin to hear any noise, as, for instance, riding on a street car and being able to hear the street car bell, or the telephone ring. She was totally deaf to all sound (R., p. 18). That at the time of testifying she could not hear at all with her right ear, and that in that ear she always has a terrible noise, a roaring noise that has never ceased, and that she hears what she hears with her left ear. On rainy or cloudy days her head feels clogged up and sounds are not as distinct as when the weather is clear (R., p. 19).

Though claiming to have suffered this very serious injury in October, 1922, with its consequent pain, suffering and total deafness in her right ear, and partial deafness in her left ear, she further testified that she first consulted a lawyer about the case in October, 1925 (R., p. 20).

In further support of her claim, plaintiff called as a witness Dr. Grover Bache Gill, a practicing physician

and surgeon in this District, who testified that he made an examination of her on February 28, 1927, nearly five years after the occurrence. At that time plaintiff told him she had had trouble with her ears and had had acid put in her ears in 1922, and complained of deafness. The examination disclosed that the eardrum of the right ear is practically gone and the one in the left ear between one-third and one-half is gone, and there was defective hearing in both ears (R., p. 21). Asked by counsel for the plaintiff what would cause the condition of the eardrums as he found it, the witness stated as follows: A good many things could cause it—a prolonged abscess of the ear following diseases of childhood, such as scarlet fever: infection; tuberculosis of the middle ear; syphilis of the middle ear; typhoid fever; mumps; most any exanthema; accident; sudden blow to the ear; anything that would destroy tissue (R., p. 22).

The witness further testified that the symptoms of Meniere's disease are cessation of hearing in either one or both ears, nausea, vomiting and vertigo. The symptoms are manifest instantly, as a rule, when the hemorrhage takes place in the inner ear. It is a disease of the inner ear (R., pp. 23-24).

On cross-examination the witness further testified that the condition of her eardrums could be caused by infection, by infection of the teeth, infection of the sinuses, and by catarrhal conditions; that he does not recall whether or not he made an examination of her nose to discover whether it had been or was a focus of infection; he made no examination of the plaintiff's

teeth for this purpose; nor of her sinuses; he made no blood test of the plaintiff, *and that from the examination he made and the history of the case as he got it from the plaintiff when she came to him, and assuming also all the facts contained in the hypothetical question put to him* (R., pp. 26, 27, 28) *to be true, and assuming further that the plaintiff's ear was in a perfectly normal condition in* 1922, *and that no focus of infection then existed in the teeth, sinuses, nose or throat* (R., p. 28), *he did not then reach a conclusion and has not as yet reached a conclusion in his own mind as to what caused her condition* (R., p. 27); that he knew nothing whatever about the condition of her nose, teeth, throat or sinuses in 1922 (R., p. 28). The only other medical testimony offered by the plaintiff was that of Dr Thomas B. Crisp, who testified that in 1923 he made an examination of the plaintiff's ears and one drum was apparently ruptured and there was scarred tissue on the other; the eardrum of the right ear was broken and the left ear was just inflamed; the eardrum in the right ear was about 50 per cent gone.

The position taken by the defendant in this case in the pleadings and at the trial was as follows:

First. The defense of the statute of limitations was a complete bar to a recovery.

In support of this defense the defendant offered the testimony of himself (R., p. 49), Miss Minnie Spitzer (R., p. 40), and Mrs. Agnes Gunning (R., pp. 44-45), and sought to offer in evidence the record made by him at the time the treatment was given, made in the

regular course of business, and in the presence of the plaintiff (R., pp. 50, 51, 52), which record the court excluded.

Second. That the eardrums of the plaintiff were not punctured or ruptured by any act of the defendant, but were already ruptured when she first came to visit him on the 13th day of October, 1922, for treatment for her throat. In support of this the plaintiff offered the testimony of himself, and sought to put in evidence a record made by him at the time of his examination of the plaintiff on that day in the regular course of business (R., pp. 50-53), which record the court excluded.

Third. That the injuries complained of by the plaintiff did not result from the defendant having placed in her ears any harmful or dangerous solution, but that at the time she received the treatment to her ears she was suffering from a sudden attack of Meniere's disease, and that the pain, suffering, dizziness, nausea, etc., which she suffered, according to her testimony, was a result of that disease. In support of this contention plaintiff offered the testimony of Miss Minnie Spitzer (R., p. 41) and Mrs. Agnes M. Gunning (R., pp. 44, 45), showing that immediately before going into the doctor's office for treatment plaintiff complained of terrible pain in her head, dizziness and nausea, and was vomiting. That these were symptoms of Meniere's disease was shown not only by the testimony of plaintiff's witness, Dr. Gill, above referred to, but by the testimony of Dr. Allen (R., p. 33) and the testimony of the defendant (R., pp. 53, 54).

In this connection defendant sought to offer in evidence a record made by him of the history of the case, showing a diagnosis of Meniere's disease and of the presence of such symptoms, a record made in the regular course of business at the time plaintiff was in his office and in her presence (R., pp. 51, 52), but the court excluded such record.

Fourth. That the condition of the plaintiff was not the result of some dangerous and harmful solution having been put in her ears, but was due to a chronic catarrhal otitis, probably due to two combined factors, one, poor ventilation of the nose, and, two, focal infection, most probably the teeth. In this he was supported by the testimony of Dr. Allen (R., pp. 31, 32), who also testified that his examination of the plaintiff and the history of her case, as given to him by her, showed that she had experienced great difficulty in breathing through the nose over a long period of years and an infection of her teeth, which, when extracted, were found to be abscessed teeth, and that she had a history of childhood diseases, including measles. Dr. Allen further testified that he found the greater part of the drum in the right ear, over three-fourths of it, and that the drum in the left ear was completely intact; that there was no evidence of scarring in the external canals of the ears and that a dropping of acid into the ears from a dropper would result in a burning of the tissues, a rotting away of the tissues and then scarring; that, according to plaintiff's statements to him, she did not hear well during rainy weather and on clear days she heard very much

better, which signified to him a catarrhal condition and that she was suffering from a catarrhal type of deafness (R., pp. 31, 32).

At the conclusion of the entire case, defendant moved the court to direct the jury to render a verdict in his favor, but the court overruled said motion (R., p. 59), and the case was submitted to the jury. The jury returned a verdict in favor of the plaintiff in the sum of ten thousand dollars ($10,000), upon which verdict judgment was entered.

From this judgment an appeal was prosecuted to the Court of Appeals of the District of Columbia. The action of that court is succinctly stated at the beginning of this brief.

Assignments of Error.

1. The trial court erred in permitting the witness, Dr. Grover Bache Gill, to answer the following question:

> "Is there any substance or liquid which, put in the ear, would destroy the tissue and destroy the ear drum?"

2. The trial court erred in permitting the witness, Dr. Grover Bache Gill, to answer the hypothetical question put to him, as follows:

> "Doctor, assume that Miss Cooley was about 22 years of age; that she had never complained of any pain or trouble with her ear; that she had had none of the diseases of childhood which had resulted in that acute condition of the ear,

pain or a discharge therefrom and had had no complaint, or had made no complaint of inability to hear, or of any defect in her hearing; that on this 25th of October, 1922, she attended a doctor, and that before he began a treatment, which was a treatment to her throat and nose, she told him that at that moment she felt as if there were some wax in her ear, it was stopped up a little, and asked him to look at her ear; that he looked at it through an instrument and said her ear was all right, but that he would put in a little mineral oil to loosen the wax; that he thereupon took with a dropper from a bottle of liquid and put it in her ear and immediately she suffered the sensations of agony and pain and roaring sounds and sounds of cannon, and that he persuaded her finally, in a short time, to permit him to insert some liquid in her left ear, and that she knocked his arm away after he had begun that insertion, and she experienced the same sensations in the left ear. That she became semi-conscious as a result of the pain and the noise that she was hearing, and was required to lie down for a period of at least two or three hours, and was then carried to a taxicab, was taken in a taxicab to her home and carried from the taxicab to her room and put to bed, where she remained for several days. Assume that at no time since then did she have any abscesses of the ear or diseases of the ears that resulted in the discharge of pus, and assume that from that time until shortly before the date of your examination that she had been attending the doctors, who had given her treatment in the form of something to relieve her pain; that her condi-

tion improved somewhat; that the deafness which she had first experienced totally for a while got better, so that she could hear better, and the pains did not continue to be so insistent, but that at times they would not be as severe, but that even to this day she has sounds in that ear, and assume that on the day of your examination you found her ear to be in the condition that you described, what, in your opinion, would be the cause of that?"

3. The trial court erred in overruling the defendant's motion to strike out the answer of the witness, Dr. Grover Bache Gill, to the hypothetical question.

4. The trial court erred in overruling the motion to strike out the answer of the witness, Dr. Grover Bache Gill, to the following question:

Q. "Now, Doctor, you said yesterday in your testimony that upon your examination you found that her eighth nerve was functioning properly, as well as it could be expected under the circumstances. Will you tell the court and jury what part the eighth nerve has to do with the ear, and what you referred to in that." A. "The eighth nerve is a nerve of hearing, and it is the nerve that transmits the sound. After it is received by the inner ear to the brain, it transmits the impulse. As a rule, if we have a case with a normal eighth nerve hearing, we usually can say without a doubt that the inner ear is perfectly all right, that there is no disease of the inner ear."

5. The trial court erred in refusing to admit in evidence the record card and report of Dr. Floyd McJ.

Allen, marked for purposes of identification "Allen Cross-examination Exhibits 1 and 2."

6. The trial court erred in refusing to receive in evidence the memorandum made by the defendant at the time of his examination of the plaintiff on October 13, 1922.

7. The trial court erred in refusing to admit in evidence the record of the history of plaintiff's case made by the defendant on October 20, 1922.

8. The trial court erred in permitting the witness Jonas M. Smith to answer the following question:

> "I will ask you whether or not on that occasion Dr. Patten directed the attention of Dr. Allen in his examination of Mrs. Stewart's ears and made the statement in the presence of Dr. Allen, as Dr. Allen was making his examination, words to this effect: 'You see that the right ear drum is practically all gone and that a part of the left is gone,' and Dr. Allen in reply said: 'Yes, I see.' "

9. The trial court erred in overruling the defendant's motion to direct the jury to return a verdict in favor of the defendant.

10. The trial court erred in refusing to grant instruction No. I, requested on behalf of the defendant.

11. The trial court erred in refusing to grant instruction No. III, requested on behalf of the defendant.

12. The trial court erred in its charge to the jury.

13. The Court of Appeals erred in affirming the judgment appealed from.

14. The Court of Appeals failed to make proper application of its own decisions, and of the decisions of this Court in accordance with the principles thereof.

15. The Court of Appeals wrongfully determined the powers and duties of a Trial Justice, and in so doing misapplied applicable decisions of this Court.

16. The Court of Appeals erred in assuming and holding that because there was some conflict in the testimony offered at the trial, the Trial Justice was bound to submit the case to the jury for its determination, even though a *"grave injustice"* might thereby result to the defendant, and a verdict against him, not based upon *"substantial issues of fact,"* but based upon *"mere caprice and sympathy,"* might follow such action on the part of the Trial Court.

I.

The Court Erred in Refusing to Admit in Evidence the Records and Memoranda of the Defendant and the Witness Allen.

The 5th, 6th, and 7th assignments of error relate to the refusal of the trial court to receive in evidence contemporaneous records and memoranda made by the defendant and by Dr. Floyd McJ. Allen, respecting the plaintiff, and they will be considered together.

When the defendant was upon the stand, he identified a written memorandum made by him on October

13, 1922, when he first examined the plaintiff (R., pp. 50-53). This memorandum showed that on that day plaintiff had a perforation of both eardrums, had received special treatment therefor, was very dizzy at times, and had a discharge from the right ear (R., p. 52).

The defendant testified that this memorandum was made at the time and that it was a memorandum such as he ordinarily made of exceptional cases. It was offered as a memorandum made at the time, in the regular course of the doctor's practice, and as a part of the *res gestæ*, but the court declined to receive it in evidence (R., pp. 50-53).

The defendant also identified a certain record made by him on the 20th day of October, 1922, containing a history of the plaintiff's case as given to him by the plaintiff, which record was made in the presence of the plaintiff, in the doctor's consultation room, where he examined her on that day. It was offered in evidence upon the same grounds as the previous record, but the court declined to receive it in evidence (R., p. 52). This history appears in the record at pages 52 and 53, and shows a diagnosis of Meniere's disease.

These records were offered in corroboration of the defendant's testimony and also as bearing upon the question of the statute of limitations.

The competency of such testimony is supported by the following decisions:

In Bean *vs.* Lambert *et al.*, 77 Fed., 862, objection was made to the introduction of certain books, on the ground that they had not been properly proved, but the court held:

> "There is nothing in the point that these books were not proven in accordance with the statutes of Minnesota relating to account books, as the books were not introduced for the purpose of proving any items of account. They were simply introduced as entries claimed to have been made at the times when the transactions actually occurred, and only for the purpose of corroborating the testimony of J. C. Norton as to the dates of those transactions, and were competent as entries purporting to have been made on those very dates."

And in Kamm *vs.* Rees *et al.*, 177 Fed., 15, 23, where objection was made to certain book entries on the ground that they were self-serving, the circuit court of appeals said:

> "(3) The entries were offered and received, not for the purpose of charging the defendant, but for the purpose of corroborating the plaintiff's testimony that credit was given to defendant and not to the Snake River Transportation Company. Book entries are often admissible for the purpose of corroborating a witness, although they may not be admissible as substantive evidence for the purpose of proving items of account."

The Court of Appeals in the case of Burson *vs.* Vogal, 29 App. D. C., 388, 392, has held that entries in a private diary were competent and admissible in corroboration of testimony. It became necessary for Burson to show the date of the conception of his invention. Burson testified as to certain dates and produced his private diary in corroboration. The Commissioner

of Patents excluded the diary, which was held to be erroneous.

The admissibility of these records is also supported by the following cases:

Cayton *vs.* English, 57 App. D. C., 324; 23 F. (2d), 745.

Insurance Companies *vs.* Weides, 14 Wall., 375.

Litteri *vs.* Freda, 241 Pa., 21.

Lapham *vs.* Kelly, 35 Vt., 195.

Taplin & Rowell *vs.* Clark, 89 Vt., 226.

In Ribas *vs.* Revere Rubber Co., 37 R. I., 189, the court refused to admit hospital record kept by an interne who testified at the trial. The court held the record should have been admitted and the refusal

> "deprives the defendant of the corroborative effect of the record upon the testimony of the witnesses in the event they were called and testified."

In Fennerstein's Champagne, 3 Wall., 145, 149, this Court says, regarding the competency of such testimony:

> "The rule rests upon the consideration that the entry, other writing, or parole declaration of the author was within his ordinary business. In most cases he must make the entry contemporaneously with the occurrence to which it relates. In all he has full knowledge, no motive to falsehood, and there is the strongest improbability of untruth. Safer sanctions rarely surround the testimony of a witness examined under oath. The rule is as firmly fixed as the

more general rule to which it is an exception. Modern legislation has largely and wisely liberalized the law of evidence. We feel no disposition to contract the just operation of the rule here under consideration."

See also:

Le Brun *vs.* Boston & Maine R. R., 83 N. H. 293.

While decisions to the contrary may be found, yet we believe that all of the authorities, when properly considered, indicate that the records of these doctors should have been admitted in evidence, for the following reasons:

1st. That "quantities and values are retained in the memory with great difficulty" (Insurance Companies *vs.* Weides, *supra*) is likewise true with respect to dates. A question in this case, of equal importance with the question of negligence, was the date upon which the plaintiff received her treatment. The record produced by the defendant was, according to the uncontradicted testimony, made on the day of that treatment, in the usual course of his occupation, in the presence of the plaintiff and showed the date of the treatment as of October 20, 1922.

2nd. The witness, Minnie Spitzer, testified that she was in the defendant's office on that day and saw the plaintiff there (R., p. 40). She paid a bill on that day and received from the defendant a receipted bill, which was received in evidence to corroborate her testimony

as to the date (R., p. 40). If this testimony was properly received in evidence to corroborate the testimony of one witness, we can see no good reason why it is not equally competent for the same purpose in so far as other witnesses are concerned.

Dr. Floyd McJ. Allen, a practicing physician and surgeon, was called as a witness on behalf of the defendant. He testified that on November 24, 1925, he made an examination of the plaintiff (R., pp. 30, 31). At the time of that examination plaintiff gave him a history or her case (R., pp. 30-31). Upon cross-examination he was asked and testified that he made a detailed written report of his examination and made a record of the examination at the time, on his usual history card covering the history of the case as given to him by the plaintiff (R., p. 34). He further testified on cross-examination that he did not bring the report or the record with him (R., p. 34). Much stress was laid by counsel for the plaintiff in his cross-examination of Dr. Allen, with respect to this record and report, as to what they were, how he made them, and why he had not produced them. Apparently this line of cross-examination was indulged in with a view either to discrediting the witness or to create in the minds of the jury an impression that, for some reason or other, Dr. Allen had an ulterior motive in not producing them in court.

Subsequently counsel for the defendant advised the court that he had obtained from Dr. Allen the report and record in question, and offered the same in evi-

dence (R., pp. 46-47), but the court refused to admit them in evidence, to which exception was duly noted (R., p. 47). The report and record appear in the record at pages 47 and 48.

Further, in connection with the competency of these records, the testimony in the case shows conclusively that there are many cases of perforated eardrums other than from the dropping of acid in the ear. Plaintiff's witness, Dr. Gill, said it might come from abscesses of the ear, childhood diseases, infection (R., p. 22), catharrhal conditions or from the teeth (R., pp. 26-27).

Dr. Allen testified that a perforation of the eardrum could be caused by impaired breathing, tooth infection (R., pp. 31-32), infection from colds (R., p. 33), abscess (R., p. 34), any childhood disease causing an infection of the middle ear (R., p. 34), colds, measles, or any acute head inflammation (R., p. 36).

Dr. Wells stated that a perforated eardrum was a common complication of measles (R., p. 43).

The plaintiff's history, as given by her to Dr. Allen for his record, admitted trouble with breathing, colds, ordinary childhood diseases, including measles and tooth infection (R., p. 48). Her history, given to defendant on October 13, 1922, admitted a discharge from one ear; the history obtained on October 20, 1922, admitted mouth breathing; *and she stated to defendant at that time that she knew both of her eardrums were perforated,* the right one more than the left (R., pp. 52-53). Though called as a witness in rebuttal, the plaintiff did not deny that she had told

the defendant when she first saw him that her eardrums were perforated (R., pp. 57-58).

We submit that the defendant was entitled to have these records submitted to the jury, records containing the history of the plaintiff's case, made up at the time, in the regular course of business, and in the presence of the plaintiff, in corroboration or impeachment of the oral testimony of the witness, as the jury might find.

Under the decision in Caton *vs.* English, *supra*, it is submitted these records and report were clearly admissible in evidence, and their exclusion was highly prejudicial to the defendant.

II.

The Court Erred in Permitting Dr. Gill to Answer the Hypothetical Question Propounded Him, and in Refusing to Strike out the Answer Thereto.

The second and third assignments of error relate to the hypothetical question asked Dr. Gill and will be considered together.

The hypothetical question propounded by plaintiff to her expert witness is the basis of two assignments of error; first, the action of the court in permitting the question to be answered; second, the action of the court in refusing to strike out the answer after cross-examination of the witness had developed certain facts with respect thereto.

The question is a lengthy one and appears in the record at pages 24 and 25. It first asks the witness

to assume that the plaintiff "never *complained* of any pain or trouble with her ear." What difference does it make whether plaintiff *complained* of any trouble with her ear or not? How can that fact be relevant or material to the issue involved here? *Non constat.* she may have had all sorts of pains in her ears, and trouble in her ears, which would clearly indicate to the medical mind that there was some disease or difficulty causing the pain and trouble. But the question limits the knowledge of the witness to the immaterial and irrelevant statement that plaintiff did not "complain," leaving the assumption that she did not, therefore, have any pain or trouble.

The question next asks the witness to assume that plaintiff "had none of the diseases of childhood which had resulted in that acute condition of the ear, pain or discharge therefrom." What acute condition was meant by "that acute condition"? Did it mean "not so acute that she *complained* of it"? Why was the doctor limited to "diseases of childhood" when other diseases, named by him as tuberculosis of the middle ear, syphilis of the middle ear, typhoid fever, mumps and any exanthema (defined by Webster as any eruptive disease, as measles), could have caused the perforation of the eardrums? And why were the diseases of childhood hedged about with the restriction of a "discharge therefrom" and "pain"? The testimony shows clearly that, if there had been an abscess, the ear would rupture and the pus would drain out, but that "it is not a running ear in the sense the patient tells of it, often the ear only runs for a few

hours'' (R., p. 34). And plaintiff's expert testified that if the rupture were caused by tuberculosis it might even be without pain (R., p. 22).

The doctor is then asked to assume that the plaintiff ''had had no complaint, or had made no complaint of inability to hear, or of any defect in her hearing,'' which again brings in the vice of the first matter he is asked to assume. Many people hear but poorly and defectively, but make no complaint about it because it is human nature to endeavor to hide such weaknesses.

Further, the doctor is asked to ''assume that at no time since then (the treatment by Dr. Gunning) did she have any abscesses of the ear or diseases of the ears that resulted in the discharge of pus.'' The absence of a discharge of pus is not an infallible indication that the physical condition of the plaintiff was not, of itself, the cause of the rupture of her eardrums. Dr. Gill's testimony shows that if any of the acute diseases of childhood had affected the eardrums there would be a discharge in the ear (R., p. 22), but he limits that to the *acute* disease of childhood; he does not in anywise explain how much of a discharge, or how long it would continue, and he carefully says later that it is ''usually'' that a discharge follows destruction of the drums by disease.

This question was objected to on the ground that it was incompetent, irrelevant, and immaterial; that it was objectionable as a hypothetical question; that it assumed important elements not appearing in the

testimony, and was intended to have the witness guess at something (R., p. 25).

The question asked, based upon the recitals contained in it, was "what, in your opinion, would be the cause of that"? and the answer was:

> "Why, she had to have *something* in there to destroy the eardrums. They were destroyed. My opinion is that they were destroyed by *something* that was put in the ear" (R., p. 25).

In the light of the testimony of this witness that at the time of testifying he had NOT "*yet reached a conclusion in his own mind as to what caused her (plaintiff's) condition*" (R. p. 29), and his further testimony, found at page 28 of the Record,

> "The putting of acids in the ear of the plaintiff would have practically the same effect on the external canal as it would have on the middle ear, if there was enough of it to hit on the side. In other words, if there was enough acid to go into the middle ear and fill it up, it would be bound to burn it as it went in. It would be destructive of the external canal, as it would be of the eardrum; there would be some tissue destroyed, undoubtedly. *When he examined the plaintiff he found the external canal in a normal condition.*"

we submit that this answer was a "*mere conjecture*" on his part, and therefore of no probative force, and incompetent (Gulf, &c. R. R. *vs.* Wells, 275 U. S., 455, 459).

We submit that, for the reasons pointed out, the question *was* irrelevant and immaterial, that it *was* objectionable as a hypothetical question, that it *did* assume important elements not in the testimony, and that it *was* intended to have the witness guess at something, and that, as a matter of fact, the witness, as indicated in his answer, *did guess.*

On the cross-examination of Dr. Gill it developed that in answering the hypothetical question he took into consideration the condition of plaintiff's eardrums and the condition of the middle ear as he found it at the time, and the condition of her hearing; *he also assumed that plaintiff's ear was in a perfectly normal condition in 1922, and that she had never had trouble previous to the time when Dr. Gunning put oil in her ear* (R., p. 28). *He also assumed that in October, 1922, no focus of infection, such as had been discussed, then existed* (R., p. 28).

None of these facts are supported by testimony; Dr. Gill knew absolutely nothing about the condition of plaintiff's nose, teeth, throat or sinuses in 1922; he made no examination of the sinuses, teeth or nose to see if they were, or had been, a focus of infection (R., p. 27). But his testimony was that infection is one of the causes of a perforated eardrum (R., pp. 26-27), and infection might be in the teeth, nose or sinus (R., p. 27).

The question as asked did not take into consideration any of the possible causes just enumerated, nor the possibility of an accident, such as a sudden blow (R., p. 23) or of any infection from a common cold.

A motion was made to strike out the answer to the hypothetical question (R., p. 29), but the motion was overruled.

We submit that the action of the court in overruling the motion and refusing to strike out the answer was improper, for the following reasons:

1. In answering the question the witness assumed facts not incorporated in the question, namely, that plaintiff's ear was in a perfectly normal condition in 1922; that there were no foci of infection in her teeth, nose, throat and sinuses; that she had no accident causing her condition; that she did not have tuberculosis or syphilis of the middle ear; that she had no disease which might have caused the perforation, without manifesting itself by a discharge from the ear.

> "Opinion evidence, to be of any value, must rest on a sound hypothesis, and if that is without support in the evidence, the opinion based thereon is without probative force."
>
> Nazzaro *vs.* Angelilli, 216 N. Y. S., 721.

2. In answering the question the witness took into consideration matters which he had learned when he made a private, *ex parte*, examination of plaintiff, namely, the then condition of her eardrums, and the then condition of her hearing, without knowing whether or not those conditions were identical with the conditions that existed in 1922.

3. The answer was a mere guess on the part of the witness in that it was based on conditions existing five

years after treatment by Dr. Gunning; in that the answer itself shows uncertainty, "she had to have *something* in there to destroy the eardrums"; and in that the doctor finally stated that he had not yet been able to reach a conclusion in his own mind as to the cause of plaintiff's trouble (R., p. 27), and, not having reached such conclusion for himself, he was manifestly not able to tell the jury what was the cause of the trouble.

The same situation existed in the case of Levy vs. Vaughn, 42 App. D. C., 146, where death occurred as a result of administering ether. No expert witness in the case could testify with certainty that the death did result by reason of the use of ether, and Mr. Chief Justice Clabaugh, in taking the case away from the jury, delivered an opinion which was approved by this court. During the course of that opinion the Chief Justice said, page 158:

> "Therefore, with the facts staring you in the face that nobody says to this jury that this intestate died from the effects of the ether, is it possible that the jury can say what the expert witnesses and all other witnesses in the case say that they cannot tell? Does the law mean that a jury can pass upon the cause of the death of a man, when those who ought to know cannot tell? The plaintiff's witnesses have said exactly the same thing that the witnesses for the defendant have said. Then, when all the witnesses concur in the statement that they cannot tell, on what theory of law can the court submit to a jury of twelve men, unlearned in the sciences, the ques-

tion of determining as to condition, when the experts themselves cannot tell?"

III.

The Court Erred in Permitting the Witness Smith to Answer the Following Question:

"I will ask you whether or not on that occasion Dr. Patten directed the attention of Dr. Allen in his examination of Mrs. Stewart's ears and made the statement in the presence of Dr. Allen, as Dr. Allen was making his examination, words to this effect: 'You see that the right eardrum is practically all gone and that a part of the left is gone,' and Dr. Allen, in reply, said: 'Yes, I see' " (R., p. 58).

Objection was made to this question on the ground that it was not proper rebuttal, that no foundation had been laid for it, and that it sought to get indirectly to the jury testimony that could not be given directly (R., p. 58), which objections, we think, were well founded.

When first placed upon the stand, Dr. Allen stated that he had examined the plaintiff on November 24, 1925, in Dr. Patten's office (R., p. 31); no reference was made in his examination-in-chief as to who was present or as to any conversation or remarks.

On cross-examination Dr. Allen was immediately asked to identify the persons present at the time of the examination, and then he was asked about a conversation, and stated that he did not remember Dr. Patten directing his attention and saying to him, "You

see, this eardrum is gone entirely and you see this other one is partly gone," and that he did not remember saying in response, "Yes, I see" (R., p. 33).

We submit that the question asked Dr. Allen was about a collateral matter, outside of the scope of the examination-in-chief, asked upon cross-examination, so that the plaintiff was bound by the testimony and had no right to impeach the witness.

Furthermore, we submit that the question asked Dr. Allen, "You see, this eardrum is *entirely* gone. You see this other one is *partly gone*" (R., p. 33) is entirely different from the question asked the witness Smith, "You see that the right eardrum is *practically all gone* and that a *part* of the left is gone" (R., p. 58), so that there was no proper foundation laid for the impeaching question.

Manifestly, such testimony could have no weight in the decision of this case. It was an attempt by indirection to get before the jury an alleged fact that could not have been introduced directly by reason of its incompetencey. Coming as it did at the last stage of the trial, it unduly and prejudicially appealed to the sympathies of the jury.

IV.

The Court Erred in Refusing Defendant's Request for Instruction No. III.

The defendant requested the following instruction to the jury, which was refused:

> "You are instructed that before plaintiff can recover in this case you must find: First, that

she sustained the injuries complained of in the declaration; second, that such injuries were caused by negligence on the part of the defendant, Dr. Edward J. Gunning; third, that such injuries were the natural and probable result of such negligence. If the plaintiff fails to establish any of these elements by fair preponderance of the evidence, your verdict must be for the defendant'' (R., p. 61).

It is submitted this requested instruction properly states a rule of law applicable to this case, and the defendant was entitled to have the instruction given in the simple, direct form in which it was presented, to guide the jury in their consideration of the case. The subject matter of this requested instruction was not covered by any instruction granted by the court (R., pp. 60, 61). It may be that by taking a word or phrase, here and there, from the charge of the court as a whole, this Court may find the principles of the requested instruction covered, but it could hardly be expected that a jury of untrained laymen could accomplish this feat.

Furthermore, in view of the state of the evidence in this case, we respectfully submit that if the requested instruction was sound, it should have been granted, to the end that counsel for the defendant might have properly presented its principles in his argument to the jury.

The refusal to grant the instruction was, we submit, prejudicial to the rights of the defendant.

V.

The Court Erred in Its Charge to the Jury.

This error alleged forms the basis of the twelfth assignment of error.

The charge of the court to the jury was quite a lengthy one and will be found in the Record at pages 62 to 72. In the course of his charge, after reviewing considerable of the testimony, the court stated to the jury:

> "And it is at this point, gentlemen of the jury, that the real question for solution arises. What did the Doctor put in her ear? Did he put into her ear anything that inflicted upon her the injury that she complains about here?"

and immediately following the court further stated:

> "Now, what is the fact? That is the crux of this case, gentlemen, on the question of alleged negligence of the defendant, but you must not guess what he did" (R., p. 69).

Irrespective of the fact that there was no direct proof that the defendant put any harmful solution in the ear of the plaintiff, how can it be said, in the light of the record in this case, that whether he did or not was the *crux* of the case and the *real* question to be determined? It seems to us that the question whether the alleged cause of action was barred by the Statute of Limitations was just as much a *real* question for the determination of the jury and constituted the crux

of the case as much as any other question. Likewise, the question of whether the plaintiff was at the time she received the treatment in question, suffering from an attack of Miniere's disease, was a *real* question for the determination of the jury. So, also, the question of whether or not the plaintiff's condition was consequent upon many of the other causes testified to by the witnesses that might be responsible for her condition, for many of which causes the defendant could in no wise be held responsible, was a *real* question for their determination and constituted as much a *crux* of the case as the question stated by the court. Again, the question whether the plaintiff's condition was due to a chronic catarrhal otitis, as testified to by Dr. Allen, was as *real* a question for the determination of the jury. Also, the question of whether, when plaintiff first consulted the defendant on October 13, 1922, her ears were then perforated, as testified to by him and as told him by the plaintiff, was a *real* question for the determination of the jury. Any one of these questions answered in the affirmative by the jury must necessarily have resulted in a verdict for the defendant, and yet we have the court, in its charge to the jury, singling out the one question, "What did the doctor put in her ear?" as the *real* question for solution by the jury, at the same time telling the jury that the solution of that question alone constituted the *crux* of the case.

It is difficult to imagine what could have been more harmful and prejudicial to the rights of the defendant than the language adopted by the court in its

charge to the jury, and the placing by the court of such undue emphasis upon this one question, with the statement that it was the real question for determination by the jury, to the exclusion of the many other questions which were equally important to be considered and determined by the jury, if the defendant was to be accorded a fair, impartial, and intelligent consideration by the jury of the case as an entirety, and of all of the questions arising upon the testimony adduced on both sides.

The court's attention was called to the matter before the jury retired to consider of its verdict, and ample opportunity afforded the court to clarify, explain, amplify or qualify the statement. The court did nothing, however, and permitted the case to go to the jury, content with reserving an exception on the part of the defendant to its action (R., p. 72). This, we submit, was error on the part of the court; and no argument is necessary to demonstrate that it was highly prejudicial to the rights of the defendant.

VI

The Court Erred in Overruling the Motion to Direct a Verdict in Favor of the Defendant and in Refusing Defendant's Request for Instruction No. 1.

This is covered by assignments of error nine and ten and is based upon the propositions, A, that the plaintiff failed to establish the negligence charged in the declaration and, B, the evidence showed that her condition may have resulted from any one of a number

of different causes, for some of which the defendant was in no wise responsible, and, therefore, the case should not have been submitted to the jury for a verdict which, if in favor of the plaintiff, must necessarily have been based upon speculation and conjecture.

A.

At the conclusion of the entire case the defendant moved the court to direct the jury to return a verdict for the defendant, the motion being based upon the fact that the plaintiff had failed to establish her case as laid in the declaration; that a verdict for the plaintiff would necessarily have to be based upon conjecture or guesswork; and that the testimony showed that the injury complained of might have resulted from many causes, for one or more of which the defendant could not be held liable (R., p. 59). The court overruled said motion and subsequently denied plaintiff's request for instruction numbered I (R., p. 60) to the effect that upon the whole evidence the jury were instructed to return a verdict for the defendant.

The negligence complained of by the plaintiff in the first count of her declaration was that the defendant put in her ears a *solution* which was harmful, dangerous and destructive of the tissues and drums of the ears (R., p. 1), and in the second count that the plaintiff injected into her ears a *solution* which was not sweet oil but was a solution harmful, dangerous and destructive of the tissues and drums of the ears (R., p. 3).

The only medical testimony offered by the plaintiff in support of these charges in her declaration is that of Dr. Gill.

It is a well-established principle of law that in cases such as this medical testimony is necessary in order to establish as definitely as possible for the jury the cause of the injury.

> "Only those are qualified to testify as to whether there was negligence in the method of treatment who themselves possess the skill required to administer such treatment, and to them the jury must listen."
>
> McCoy *v.* Buck, 37 Ind. App. 433.

> "It takes more than the opinion of one or more physicians or surgeons that the treatment followed in a given case should have been different to lay a foundation for malpractice."
>
> Gramaldi *v.* Zeglio, 3 N. J. Misc. R. 669; 129 Atl. 475.

The only expert witness offered by the plaintiff in support of her cause of action testified that he obtained a history of the plaintiff's case from her when she came to him; this history is known medically as subjective symptoms; and the witness usually regarded subjective symptoms in reaching a conclusion (R., p. 27). Considering all of the history the witness obtained from the plaintiff, and considering all of the knowledge that he had gained in an examination made of the plaintiff, and assuming the truth of all of the statements contained in the hypothetical

question which had been propounded to him, and assuming, in addition, that plaintiff had no form of infection, and assuming that the plaintiff's hearing was in a perfectly normal condition in 1922, and assuming that the plaintiff had no diseased condition of any kind which would cause a perforated eardrum, the witness, nevertheless, testified that at the time he examined the plaintiff *he reached no conclusion as to the cause of her trouble and that, as a matter of fact, he had not yet reached any conclusion in his own mind as to the cause of plaintiff's trouble* (R., p. 27). This, then, presents the same situation as existed in Levy *vs.* Vaughn, *supra,* where the Court affirmed a directed verdict for the defendant.

As we understand it, the office of expert testimony of the kind offered in this case is to show the jury that the condition complained of by the plaintiff is caused by the negligent act charged against the defendant. How can this testimony fulfill that office when the witness who gives it tells the jury that he has not "as yet reached a conclusion in his own mind" as to the cause of plaintiff's injury? If the witness has reached no conclusion for himself, he is manifestly unable to enlighten the jury and assist them in reaching the true conclusion.

Furthermore, if this expert in the light of all the facts before him and assumed by him as hereinbefore shown is unable to reach a conclusion as to the cause of plaintiff's injury, how can a jury of laymen reach a conclusion, except and only it be based upon speculation and conjecture?

B.

The testimony of all the expert witnesses in the case shows conclusively that there are many causes for the perforation of an eardrum, other than that claimed by the plaintiff to have been the cause in this case.

For the plaintiff, Dr. Gill testified that such a condition could be caused by a good many things; a prolonged abscess of the ear following diseases of childhood, such as scarlet fever; infection; tuberculosis of the middle ear; syphilis of the middle ear; typhoid fever; mumps; any exanthema (R., p. 22). An accident, a sudden blow to the ear, and anything that would destroy tissue would rupture the eardrum (R., p. 23). The rupture might be caused from an infection in the teeth (R., p. 27) or by a catarrhal condition or by an infected sinus (R., p. 27).

For the defendant, Dr. Allen testified that plaintiff's condition was caused from chronic catarrhal otitis, probably due to poor ventilation of the nose and infection in the teeth (R., pp. 31, 32). An infection in the head, such as a cold, could result in a ruptured drum (R., p. 32). If the plaintiff, in childhood, had suffered a disease which had caused an infection of the middle ear, the abscesses would form in childhood and the rupture of the drum would follow at the time of the abscess (R., p. 34). The breaking of such abscess would not mean a running ear in the sense the patient tells of it, for often the ear runs only for a few hours (R., p. 34). Secondary measles, an ordinary cold, or any acute head inflammation, could be the cause of plaintiff's condition (R., p. 36).

Dr. Wells testified that any inflammation that went to a suppurative stage was almost certain to produce a perforation of the eardrum; every child, for instance, who has had an abscess of the ear, it means that the drum membrane has become perforated (R., p. 42). Infection of the ear is a common complication of measles (R., p. 43).

Thus the testimony shows conclusively that there were a dozen or more possible causes for the perforation of plaintiff's eardrum. It, therefore, became necessary for her to demonstrate not only that the condition of which she complained was not due to any of these causes, but that it was due to the negligence of the defendant.

In Bennett *vs.* Washington Terminal Company, 55 App. D. C., 111, 113, where there was no definite testimony showing how decedent met his death, whether he was killed by a train of the Pennsylvania Railroad or by an engine of the Washington Terminal Company, the trial court took the case away from the jury on the ground that there was no basis upon which the case could have been submitted. The court, through Mr. Justice Van Orsdel, in affirming the action of the trial court, says:

> "No one saw Bennett struck. No one knows what he did after the time he was cut off from the view of the witness Arnold by the movement of the Pennsylvania train. Counsel for defendant advance the theory that he was in fact struck by that train and thrown on track 19, where he was run over by the shifting engine. This theory is as plausible as any other

that can be indulged in this case. To have left the question of defendant's negligence to the jury would have opened up an endless realm for speculation and conjecture, for the building of inference upon inference and presumption upon presumption.

• • • • • • •

"The presumption that the accident resulted from any one of these causes might be indulged. Where, as in this instance, the accident may have resulted from any one of a number of different causes, and in any one of a number of different ways, the court will not permit the jury to speculate as to how it occurred, and arrive at a verdict which at best would amount to a mere guess. It was incumbent upon the plaintiff to establish the negligence of the terminal company by affirmative proof."

This Court has laid down the same rule of law. In Patton *vs.* Texas & Pacific Railway Company, 179 U. S., 658, 663, the court said that

" • • • it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee

> is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

In Matuschka *et al. vs.* Murphy, 173 Wis., 484, a malpractice case, the court said:

> "In order to recover against the defendant, the plaintiff must produce evidence from which the jury is justified in finding that it (plaintiff's condition) was due to the want of care and skill by defendant Stromberg. This burden is not met by showing it might have been the result of two or more causes, one of which was the defendant's unskillfulness. Verdicts must rest upon greater certainty."

The late Chief Justice Clabaugh, in an opinion in a malpractice case, approved by the Court of Appeals (Levy *vs.* Vaughn, *supra*), said:

> "You cannot hold people responsible by evidence upon which the jury can draw an inference only by speculation. It must be proof that is positive to such a degree as that the inference naturally arises. In this case we have nothing but speculation on that subject.

Of all the possibilities that might have caused plaintiff's condition, there is not a scintilla of evidence that she had not had typhoid fever, mumps, colds, scarlet fever, the latter branded by her own expert as one of

the most destructive forms of middle ear infection (R., p. 22).

Measles, with which a perforated eardrum is a common complication (R., p. 43), is negatived by the plaintiff with but little effect. Plaintiff's mother did not think plaintiff had measles, but she really did not remember, because she had seven children, some of whom did have the measles (R., p. 16). But plaintiff herself remembered having the measles, for she gave Dr. Allen a history of childhood diseases, including measles (R., p. 31).

No one testified that plaintiff did not have tuberculosis or syphilis of the middle ear; Dr. Gill made no blood tests and knew nothing about the condition of plaintiff's nose, teeth, throat or sinuses in 1922 (R., p. 27). But plaintiff again admitted dental trouble resulting in the extraction of a number of teeth about 1923, and at the time they were extracted they were abscessed teeth (R., p. 31), and the history card of Dr. Allen shows that the dentist was amazed to find so many teeth dead (R., p. 48).

Plaintiff herself, on October 13, 1922, gave the defendant a history of a discharge from the right ear (R., p. 52), and stated to Dr. Gunning that she knew her eardrums were perforated, the right eardrum being perforated more than the left (R., p. 53). Although the plaintiff took pains to deny many other statements made by Dr. Gunning in his testimony, there was no attempt to deny that she told Dr. Gunning that she had perforated eardrums when she first visited him (R., p. 58), the denials being limited by the plaintiff to the occasion of her last visit.

We submit that in this condition of the testimony it was the duty of the trial court to take the case from the consideration of the jury and not permit them to enter upon "an endless realm for speculation and conjecture, for the building of inference upon inference and presumption upon presumption." As said by this Court in Gulf, Mobile and Northern R. R. Co. *vs.* Wells, *supra:*

> "In no aspect does the record do more than leave the matter in the realm of speculation and conjecture. That is not enough."

VII.

The Opinion and Judgment of the Court of Appeals.

We do not deem it necessary to further argue the propositions set forth in the assignments of error numbered 13 and 14, but we wish to briefly consider the propositions contained in those numbered 15 and 16, which are as follows:

THE COURT WRONGFULLY DETERMINED THE POWERS AND DUTIES OF A TRIAL JUSTICE, AND IN SO DOING MISAPPLIED APPLICABLE DECISIONS OF THIS COURT.

THE COURT ERRED IN ASSUMING AND HOLDING THAT BECAUSE THERE WAS SOME CONFLICT IN THE TESTIMONY OFFERED AT THE TRIAL, THE TRIAL JUSTICE WAS BOUND TO SUBMIT THE CASE TO THE JURY, FOR ITS DETERMINATION, EVEN THOUGH A "GRAVE INJUSTICE" MIGHT THEREBY RESULT TO THE DEFENDANT, AND A VERDICT AGAINST HIM,

NOT BASED UPON "SUBSTANTIAL ISSUES OF FACT," BUT BASED UPON "MERE CAPRICE AND SYMPATHY" MIGHT FOLLOW SUCH ACTION ON THE PART OF THE COURT.

The basis of the opinion of the Court is that inasmuch as there was a conflict in the testimony of the witnesses the Trial Justice was bound, under the previous decisions of that court, to submit the case to the jury for its determination.

In the concurring opinion of Mr. Justice Van Orsdel he states he is *forced to this conclusion, notwithstanding his belief that a very grave injustice has been done in the case.* Apparently his opinion is based upon the theory that the Trial Justice *lacked the power to deal with the case in such manner as would prevent grave injustice* to the defendant, and, being a mere *automaton* he was compelled to leave the case to the decision of the jury even though, in so doing, his action would result in eliciting a verdict based, not upon *substantial issues of fact,* but rather upon *mere caprice and sympathy.*

The opinion in full is as follows:

> "I concur in the opinion affirming the judgment of the trial court. I am forced to this conclusion, notwithstanding my belief that a very grave injustice has been done in this case. Under the strict rule adopted by this court in the cases cited and relied upon by the Chief Justice in his opinion, there is in my judgment sufficient evidence to carry this case to the jury.
>
> "A motion for a directed verdict challenges the sufficiency of the evidence to take the case to the jury. It presents a question of law for the

trial court and the appellate court which alone can be determined by an analysis of the evidence. It is a mere travesty to say that the court is bound to send the case to the jury, if there is any evidence tending to support the contention of the plaintiff, and shut its eyes to the justice or injustice of a verdict resting upon such a flimsy basis. It is my fixed opinion, as expressed on many occasions, that the rule established in the decisions referred to, and in many other decisions of this court, is too strict and should be modified to the extent of confiding in the court the power to determine whether or not the evidence is sufficient to raise a reasonable issue of fact, capable of supporting a verdict that will meet the substantial ends of justice.

"I trust that such a rule of procedure may yet be adopted by the unanimous concurrence of the justices of this court, as will lift the trial justice in this District from a mere automaton to the exercise of his lawful and proper judicial function of seeing that cases are submitted to juries in accordance with such lawful rules of procedure as will elicit verdicts based upon substantial issues of fact rather than mere caprice and sympathy."

We quite agree that by the verdict and judgment in this case a *grave injustice* was done the defendant. We likewise agree that such verdict was not based upon the determination of *any substantial issue of fact.* We assert that its only basis was *"mere caprice and sympathy."*

With profound respect for the opinion thus expressed we respectfully submit the adoption of any such rule is unnecessary. Trial Justices, according to

the decisions of this Court covering a long period of time, hereinafter referred to, not only have such *power*, but the *duty of exercising such power* rests upon them. If any Trial Justice in this District functions as a "*mere automaton*" he does so for one of two reasons:

1. Because he fails to realize the power vested in him, and the duty resting upon him by virtue thereof, or,

2. Realizing the power thus vested in him, and cognizant of such duty, he neglects to exercise the power and perform the duty.

As far back as the case of Pleasants *vs.* Fant, 22 Wall., 116, this Court, in unequivocal terms, defines the duty of the trial court as follows:

> "It is the *duty of the Court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial.*" * * *
>
> "In the discharge of this duty it is the province of the Court, either before or after the verdict, to decide *whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor.*" (Italics ours.)

Again says this Court in the case of Patton *vs.* Texas & Pacific Ry. Co., 179 U. S., 658, in speaking with reference to the powers and duty of the trial judge:

> "At the same time, *the judge is primarily responsible for the just outcome of the trial.*

> *He is not a mere moderator of a town meeting,* submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, *but one who in our jurisprudence stands charged with full responsibility."* (Italics ours.)

The most effective way of exercising this power and performing this duty by trial judges is for them to determine "whether or not the evidence is sufficient to raise a responsible issue of fact capable of supporting a verdict that will meet the substantial ends of justice."

We admit that in the case at bar there was a conflict of testimony. But we do not admit that there was any substantial conflict of testimony with respect to any substantial or controlling issue in the case. We do not deny the general rule laid down in the authorities referred to in the majority opinion of the Court. We respectfully deny its applicability to the case at bar, as it appears from the record. It is not every case where there is a conflict of testimony that should be submitted to a jury for determination. If that were so the power vested in trial judges and the duties resting upon them, as defined by this Court, are meaningless.

It is only where there is a substantial conflict of testimony respecting substantial and controlling issues of a case, and only where the state of the testimony would warrant or justify a verdict accordingly as the jury might determine the right and truth of such conflicting testimony, and where a verdict thus found

would do substantial justice between the parties, that the court is justified in submitting a case to the jury for its determination. But where the state of the testimony is such that "grave injustice" to a party may result from a verdict or where a verdict may follow based upon "mere caprice or sympathy" the trial judge is never justified in letting the case go to the jury. *The trial judge stands charged with full responsibility to protect parties litigant against such results.*

In the case of Pleasants *vs.* Fant, *supra,* this Court in discussing the duty of the trial judge to decide whether the plaintiff has offered evidence *sufficient to support a verdict in his favor,* the Court says the question is:

> "Not whether on all the evidence the preponderating weight is in his favor, that is the business of the jury, but conceding to all the evidence offered the greatest probative force to which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? * * * Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial granted? Such a proposition is absurd, and accordingly *we hold the true principle to be, that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff,*

the court should say so to the jury." (Italics ours.)

In speaking of the power of trial judges to direct verdicts and the duty of the court so to do, it is said in Oscanyon *vs.* Arms Co., 103 U. S., 261:

> "The practice is a wise one, it saves time and costs; *it gives a certainty of applied science to the results of judicial investigation; it draws clearly the line which separates the provinces of the judge and jury, and fixes where it belongs the responsibility which should be assumed by the court.*" (Italics ours.)

See also:

Randall *vs.* B. & O. R. R. Co., 109 U. S., 478.
District of Columbia *vs.* Moulton, 182 U. S., 576.
Famous Smith *vs.* United States, 151 U. S., 55.

In Improvement Company *vs.* Munson, 14 Wall., 442, it is said:

> "*Nor are judges any longer required to submit a question to a jury merely because* SOME *evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge,*

not whether there is literally no evidence, but whether there is any upon which a jury CAN PROPERLY PROCEED *to find a verdict for the party producing it, upon whom the onus of proof is imposed.*" (Italics ours.)

In Bowditch *vs.* Boston, 101 U. S., 16, it is said:

"It is now the settled rule in the courts of the United States that whenever, in the trial of civil cases, it is clear that *the state of the evidence* is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, *it is the right and duty of the judge to direct the jury to find according to the views of the court.* Such is the constant practice, and it is a convenient one. It saves time and expense. It gives scientific certainty to the law in its application to the facts and promotes the ends of justice." (Italics ours.)

In *Commissioners, etc., vs. Clark,* 94 U. S. 278, it is said:

"*Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence.* Ryder *vs.* Wombwell, Law Rep. 4 Ex. 39.

"*Decided cases may be found where it is held that if there is a* SCINTILLA *of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have es-*

tablished a more reasonable rule, to-wit, that, before the evidence is left to the jury there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence but whether there is any upon which a jury can PROPERLY *proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.''* (Italics ours.)

In Coughran *vs.* Bigelow, 164 U. S. 301, it is said:

> "The foundation for those rulings was not in the constitutional right of a trial by jury, for *it has long been the doctrine* of this court that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the onus of proof is imposed, and that, *if the evidence be not sufficient* to warrant a recovery, IT IS THE *DUTY of the court to instruct the jury accordingly,* and, if the jury disregard such instruction, to set aside the verdict." (Italics ours.)

We respectfully submit in the light of these authorities and in view of the state of the record in the case, the trial court was imposed with the duty of directing a verdict in favor of the defendant. It had the power so to do and thereby protect the defendant from "grave injustice" and a verdict based, not upon substantial evidence establishing the charges made against him, but upon "mere caprice and sympathy." Having failed to exercise this power and to perform this

duty it was within the power of the Court of Appeals and the duty was imposed upon it, to correct this error and to right the wrong consequent upon it.

We have a determination of one Justice that "there was no basis whatever for the verdict and judgment." We have also the determination of another Justice, "that a very grave injustice has been done in this case," evidently founded upon the conviction that the verdict of the jury was not based upon the determination of any "responsible issue" in the case, but rather upon "mere caprice and sympathy"—a verdict that does not "meet the substantial ends of justice."

In this situation it is respectfully submitted this case should be determined according to the broad principles of justice and fairness laid down and consistently followed by this Court in the foregoing cases, rather than upon the strict and narrow rule laid down in the opinion of the Chief Justice filed herein. If this latter rule is to prevail we unhesitatingly say, as did Judge Thayer in Haire *vs.* Reese, 7 Phila., 140:

> "* * * God forbid that the law should apply any rule so rigorous and unjust as that to the relations and responsibilities arising out of this noble and humane profession."

In conclusion we ask:

Has it come to pass in the administration of justice in our courts that a judge presiding at the trial of a cause, charged with full responsibility of seeing that substantial justice is done between parties litigant, is bound to take an action which may result in a "*grave*

injustice" to one of the parties, and which may elicit a verdict based upon *mere caprice and sympathy?*

Is a Justice of an Appellate Court reviewing such action of a Trial Justice forced to affirm it, notwithstanding he believes, and says, a grave injustice has been done in the case?

> "* * * Two wrongs never make a right, and two errors cannot correct a defective record." Van Orsdel, J., in Pickford *vs.* Hudson, 32 App. D. C., 480, 488.

It is respectfully submitted the judgment in this case should be REVERSED.

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